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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Jane Roe, II,

Petitioner,

v.

Aware Woman Center For Choice, Inc., a Florida corporation, Edward W. Windle, Jr., Patricia B. Windle, and William P. Egherman, M.D.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

Michael R. Hirsh
Petitioner's Counsel of Record
125 TownPark Drive
Suite 300
Kennesaw, Georgia 30144
(770) 420-8224

QUESTIONS PRESENTED

Jane Roe, II was forced to continue with an unwanted abortion in the Aware Woman Clinic in Melbourne, Florida. She sued unsuccessfully under the Freedom of Access to Clinic Entrances Act. The summary judgment against her was upheld by the United States Court of Appeals, thereby raising the following questions:

FIRST

Does a pregnant woman have the absolute right to refuse an abortion?

SECOND

Is the right of a pregnant woman to refuse an abortion in an abortion clinic protected by the Freedom of Access to Clinic Entrances Act ?

THIRD

Is a forced abortion done by an abortionist in an abortion clinic a violation of the Freedom of Access to Clinic Entrances Act as a matter of law ?

PARTIES TO THE PROCEEDING

"Petitioner"

Jane Roe, II

"Respondents"

Edward W. Windle, Jr., individually, Patricia B. Windle, individually, William P. Egherman, M.D., individually, and Aware Woman Center For Choice, Inc.

CORPORATE DISCLOSURE

Aware Woman Center For Choice, Inc. is a Florida corporation; to the best of petitioner's knowledge it is owned solely by Edward W. Windle, Jr. and Patricia B. Windle.

NOTE TO THE COURT: There have been two previous petitions for writ of certiorari to the United States Supreme Court concerning this case; both were denied.

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Petitioner, Jane Roe, II, respectfully requests that a writ of certiorari be issued to review the decree of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The order of the United States District Judge in *Jane Roe, II v. Aware Woman Center For Choice, Inc, Edward W. Windle, Jr., Patricia Baird Windle, and Wiliam P. Egherman, M.D.*, Case Number 99-00850-CV-ORL-19KRS is shown at Appendix A; judgment was entered for the Defendants on July 10, 2003. Appendix B.

The United States Court of Appeals for the Eleventh Circuit, in *Jane Roe, II v. Aware Woman Centero For Choice, Inc., Edward W. Windle, Jr., Patricia Baird Windle and William P. Egherman, M.D.*, Case Number: 03-14071, upheld the decision in the District Court, as shown in Appendix C.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals") was entered on January 23, 2004. There was no petition for rehearing filed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. §1291.

STATUTORY PROVISIONS INVOLVED

This case involves the federal statute called Freedom of Access to Clinic Entrances Act, (F.A.C.E.) 18 U.S.C.§ 248, which states in pertinent part:

> (a) **Prohibited activities.** - Whoever -
>
> **(1)** by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;
>
> (c) **Civil remedies.** -
>
> **(1) Right of action**.-
>
> **(A) In general.**-Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services . . .
>
> **(e) Definitions.**- As used in this section:
>
> **(1) Facility.**- The term "facility" includes a hospital, clinic, physicians office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located.
>
> **(5) Reproductive health services.**- The term "reproductive health services" means reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes

medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

STATEMENT OF THE CASE

A. Background.

Jane Roe, II screamed and screamed. She screamed for Dr. Egherman to stop the abortion. He stopped but only for a moment. He ordered his assistants to pin Jane Roe, II to the table. Then he forced her to go on with the abortion.

Dr. Egherman stopped the abortion only after he pulled part of Jane Roe, II's intestines out of her vagina. Once again he stopped briefly.

Then for a third time Dr. Egherman pushed the smallest dilator into Jane Roe, II's vagina. He later claimed that he did so to diagnose her condition, that he was trying to save her life at this time.

The mother and the abortionist were in the Aware Woman Center For Choice clinic in Melbourne, Florida, site of the *Madsen* injunction. 114 S.Ct. 2516, 129 L.Ed. 2d 593 (1994).

B. The Proceedings Below

Jane Roe, II sued all of the respondents in United States District Court, Middle District of Florida, for a FACE violation because she was prevented from leaving Aware Woman Center For Choice clinic in order that an abortion could be forced upon her.

The District Judge dismissed the complaint, holding that motivation allegations were absent and requiring that Jane Roe, II surrender her anonymity as the condition to filing an amended complaint. Jane Roe, II appealed this order.

The Eleventh Circuit reversed the holding on anonymity but upheld the part of the ruling dealing with motivation. An amended pleading would be allowed.

Such a pleading was filed by Jane Roe, II. Various discovery efforts by all parties included depositions of Jane Roe, II, Dr. Egherman and Mr. and Mrs. Windle. Excerpts from Dr. Egherman's deposition are included in the Selected Exhibits.

Summary judgment for the respondents was granted by the District Judge who determined that the requisite motivation under 18 U.S.C.§248 could not be established. Once again, Jane Roe, II appealed.

The Eleventh Circuit upheld the summary judgment.

REASON FOR GRANTING THE WRIT

First: A pregnant woman has the absolute right to refuse an abortion.

The absolute right of a woman to become a mother is older than civilization itself. It predates the stations of history recited in *Griswold v. Connecticut*, 381 US 479, 14 L Ed 2d 510, 85 S.Ct. 1678 (1965), where the United States Supreme Court considered reproductive rights, writing " [t]he present case, then concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." *Id.* at 515, 14 L.Ed 2d 510.

Several years later, this legal concept resulted in the legalization of abortion.

Roe v. Wade, 410 U.S. 113, 35 L.Ed. 2d 147, 93 S.Ct. 705 (1973), the landmark abortion case, was reviewed by the United States Supreme Court in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 120 L.Ed. 2d 674, 112 S.Ct. 2791 (1992). In turn, *Casey*(*supra*) was revisited by the United States Supreme Court in *Stenberg v. Carhart*, 147 L.Ed. 2d 743 (2000).

Stenberg v. Carhart, *id.* at 754, 147 L.Ed. 2d 743 holds that a woman's decision to get an abortion may be restricted under some circumstances, because the State has an interest in protecting fetal life. That interest is not violated when a woman rejects an abortion.

That a woman's right to be free of an unwanted abortion is absolute is found in *Casey* (*supra*), where this Court stated:

If indeed the woman's interest in

> deciding whether to bear and beget a child had not been recognized as in Roe, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example. Yet Roe has been sensibly relied upon to counter any such suggestions. E.g. Arnold v. Board of Education of Escambia County, Ala., 880 F2d 305, 311 (CA11 1989) (relying upon Roe and concluding that government officials violate the Constitution by coercing a minor to have an abortion). 703, 120 L.Ed. 674.

Since the State has no interest in restricting the absolute right of women to refuse abortions and since fetal life is obviously not endangered by such a decision, the appeals court was wrong to reject Jane Roe, II's claim, in effect, that she could refuse an abortion at any time. She had an absolute right to refuse the abortion.

Second: The right of a pregnant woman to refuse an abortion in an abortion clinic is protected by the Freedom of Access to Clinic Entrances Act.

United States Supreme Court Justices Ginsberg and Breyer specifically concurred in *Scheidler v. National Organization for Women*, 154 L.Ed. 2d 991 (2003) in part, because the Freedom of Access to Clinic Entrances Act, 18-U.S.C. § 248 (FACE) could be used against crimes committed in abortion clinics.

The terms of the FACE statute offer a pregnant mother ("mother" is the word chosen by the Eleventh Circuit to describe Jane Roe, II at page 30a of the Appendix) the expectation that she will be protected from obstruction while leaving an abortion clinic. 18 U.S.C. §248. In other words, a mother could not be forced to remain inside such a facility.

However, the Eleventh's decision in this case effectively allows an abortionist to decide whether his actions should be governed by the FACE statute or not. All it takes to achieve exemption is for the abortionist to declare that his motivation in assaulting the mother and forcing her to undergo an unwanted abortion is that he was motivated by his desire to protect her life.

This unilateral escape clause devised by the Eleventh Circuit for abortionists would clearly erase the absolute right of women to be free from forced abortions.

A forced abortion is the worst of crimes which might be committed in an abortion clinic. Its elements satisfy the statutory requirements of FACE for a woman's protection.

Third: A forced abortion done by an abortionist in an abortion clinic is a violation of Freedom of Access to Clinic Entrances Act as a matter of law.

Jane Roe, II does not contend that the necessity defense is unavailable to those charged with FACE violations - - with one notable exception: forced abortion.

A temporary obstruction of a pregnant woman whether coming to or leaving an abortion clinic when done to save her life is not one with permanent consequences. However, this is not true of a forced abortion.

A forced abortion precludes for all time any and all reproductive health services as defined and protected under FACE. 18 U.S.C. §248. This intentional crime results in a condition that can never be undone. As a criminal and civil wrong under FACE, it is a class by itself.

There is no logical way to explain away the motivation of an abortionist who commits an intentional forced abortion. As stated in the alternative by the Eighth Circuit in *United States v. Dinwiddie*, 76 F.3d 913, 923 (8th Cir. 1996):

> FACE would, for example, apply to anyone who blockades a clinic to prevent a woman from getting an abortion, regardless of the message expressed by the blockade. Thus, FACE would prohibit striking employees from obstructing access to a clinic in order to stop women from getting abortions, even if the workers were carrying signs that said, "We are underpaid !" rather than "Abortion is wrong !".

Such an abortionist knows that the mother can never again receive FACE-defined services for that pregnancy and he has effectively prevented her from obtaining services at any other reproductive health facility of her choice.

As a matter of law, forced abortions committed by abortionists in their facilities violate 18 U.S.C. §248.

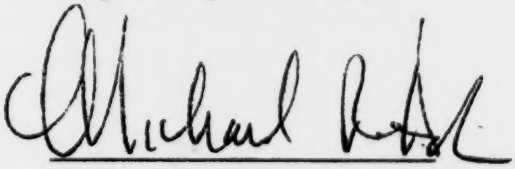
CONCLUSION

Review is essential if Jane Roe, II is to receive justice. The nameless millions of women who, as the selected exhibits show, have suffered forced abortions in the past are due the hope that their daughters and granddaughters will not have to endure such atrocities in the future.

The burden of providing both hope and justice to these millions of women rests squarely on the United States Supreme Court.

Thus, Jane Roe, II respectfully requests that this Court grant a writ of certiorari and any other appropriate relief.

Respectfully submitted,



Michael R. Hirsh
Counsel of Record
125 TownPark Drive
Suite 300
Kennesaw, Georgia 30144
(770) 420-8224

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No.6:99-CV-850-ORL-19KRS
(Filed July 10, 2003)

JANE ROE, II,
Plaintiff,
vs.

AWARE WOMAN CENTER FOR CHOICE, INC., EDWARD W. WINDLE, JR., PATRICIA B. WINDLE, WILLIAM P. EGHERMAN, M.D.
Defendants.

ORDER

This case was considered by the Court on the following:

1. Defendants, Aware Woman Center For Choice, Inc., Edward W. Windle, Jr., and Patricia B. Windle's Dispositive Motion for Summary Judgment, Doc. No. 66.

2. Memorandum of Law in Support of Defendants Motion for Summary Judgment, Doc. No. 67

3. Plaintiff Jane Roe, II's Brief in Opposition to Defendants Patricia Windle, Edward Windle, and Aware Woman Center For Choice's Motion for

Summary Judgment. Doc. No. 83.

5. Plaintiff Jane Roe, II's Brief in Support of her Motion for Partial Summary Judgment. Doc. No. 84.

6. [Defendant Egherman's] Motion for Final Summary Judgment and Memorandum of Law in Support. Doc. No. 89

7. Defendants, Aware Woman Center for Choice, Inc., Edward W. Windle, Jr. and Patricia B. Windle's Memorandum in Opposition to Plaintiff, Jane Roe's Motion for Partial Summary Judgment. Doc. No. 91.

8. [Defendant Egherman's] Opposition to Plaintiff, Jane Roe, II, Motion for Summary Judgment. Doc. No. 92.

9. Plaintiff Jane Roe, II's Brief in Opposition to Defendant Egherman's Motion for Summary Judgment. Doc. No. 102.

Plaintiff brought a one-count complaint (Doc. No. 39) under 18 U.S.C. §248(a)(1) against Defendants collectively for performing abortion-related medical care on her after she had explicitly revoked her consent.

Background

On March 29, 1997, Plaintiff went to the Aware Woman Center in Melbourne, Florida for a scheduled abortion. A week before her procedure she visited the clinic to go through a mandatory pre-abortion orientation, which involved counseling, a video, and completion of an informed consent form.[1] Doc. No. 71, Roe Depo., pp. 99, 102.

[1]Plaintiff's deposition is somewhat confusing concerning how many times she visited the clinic in March 1997. It appears that she may have visited it three times, the 10th, the 22nd, and the 29th. Doc. No. 71, Roe Depo., pp. 92-94, 99-100.

Plaintiff's 1997 abortion was her fourth, and Plaintiff testified that she was aware of its risks.

Upon her arrival, Plaintiff was asked to take a urinalysis to confirm that she was pregnant. *Id.* At p. 102; Doc. No. 75, Egherman Depo., p. 120. She then donned a surgical gown and was directed to a waiting room where she sat with other women who were also there for abortions. Doc. No. 71, Roe Depo., p.103. Plaintiff testified that, in comparison with her previous experiences, women were being shuttled in and out of the operating suite at a disconcertingly fast pace, as though they were on "an assembly line or something" *Id.* at p. 105.

When it was Plaintiff's turn, she was called into the operating suite and asked to lie down on the table. She recalled the staff trying to soothe her because she was so agitated. She repeatedly told them she was "afraid" *Id.* At p. 108. Dr. Egherman who performed the procedureand is a Defendant in the instant lawsuit, testified that the clinic staff informed him immediately prior to the abortion that Plaintiff was "very, very nervous." Doc. No. 75, Egherman Depo., p. 128. He decided to administer inhalational nitrous oxide as a sedative, which is indicated only for uncommonly anxious patients. *Id.* At pp. 128-129. Other than reassuring her at the outset, Dr. Egherman did not concentrate primarily on Plaintiff's anxiety because there was a patient advocate in the operating room whose only responsibility was to ensure her well-being. *Id.* At pp. 131, 151, 159.

Dr. Egherman intended to perform an abortion procedure known as "dilation and curettage" ("D&C"). A D&C involves inserting progressively larger dilation rods into the uterus through the vagina and cervix. Once the cervix is dilated, the doctor scrapes out the uterus with a vacuum-powered curette which dismembers and removes the fetus.

Dr. Egherman began the abortion by performing a pelvic examination to augment what he knew from the ultrasound about the orientation of the uterus, how many months pregnant Plaintiff was, and existence of any abnormal masses in her reproductive organs. *Id.* At p. 144. He then inserted the speculum to retract vaginal tissue and afford him an unimpeded view of the cervical collar. *Id.* At p. 146. This did not go well, however. Though insertion of a speculum is not painful if performed properly, Dr. Egherman testified that Plaintiff squirmed and complained, indicating to him that she had serious and unusual apprehension. *Id.* After disinfecting and anesthetizing the cervix, he began to dilate Plaintiff with a 39 millimeter rod. *Id.* at p. 155. When she achieved proper dilation, he inserted the suction curette.

At some point Plaintiff began to complain of intense pain, which subsequent medical treatment would verify was the result of a uterine perforation and laceration of her colon. *Id.* at p. 156; Doc. No. 71, Roe Depo., pp. 109-111. Dr. Egherman testified that he is not medically certain what caused the initial perforation, though the laceration appears to have been inflicted when the suction curette passed through the aperture in her uterus and began to abrade the highly sensitive colon. Doc. No, 75, Egherman Depo., pp. 156-158. Alternatively, Dr. Egherman may have lacerated Plaintiff's colon when he used heavy "bear" forceps to extract what he mistakenly thought was stubborn fetal tissue refusing to separate from the uterine wall. *Id.* at p. 169. He was instead probably biting into her colon through the uterine perforation he had inadvertently created. *Id.*

Experiencing intense pain, which she knew to be abnormal on the basis of her previous abortions, Plaintiff ordered Dr. Egherman to stop. Doc. No. 71, Roe Depo., p. 113; Doc. No. 75, Egherman Depo., p. 156 ("But what I do remember her saying is 'my God, you're hurting me, you're killing me, I'll never be able to have babies."). Dr. Egherman

temporarily withdrew when told by Plaintiff to stop, but then proceeded with invasive medical treatment despite her protests. He is not certain at what point Plaintiff directly ordered him to stop, but he does know that he realized soon after she reported intense, atypical pain that a serious complication had occurred. *Id.* at p. 159. His tactile intuitions had been telling him that something was not right, and his concerns were confirmed when it became apparent that the suction curette was clogged with non-fetal tissues and his use of the "bear" forceps was not yielding the right result. *Id.* at pp.159, 169. At that point he abandoned the procedure and shifted into diagnostic mode to figure out what precisely was wrong and if Plaintiff was in any immediate jeopardy. *Id.* at p. 169.

Plaintiff, however, refused to assent to any additional treatment. She demanded to be allowed to leave. Doc. No. 71, Roe Depo., p. 86. It was at this point that Dr. Egherman ordered his staff to restrain Plaintiff so that he could treat he against her express wishes. *Id.*; Doc. No. 75, Egherman Depo., pp. 174, 190-192, 197. This act of restraint and the ensuing medical care, administered in spite of Plaintiff's revocation of consent, constitutes the basis of her cause of action against Defendants.

Dr. Egherman used an ultrasound machine to survey Plaintiff's internal organs to determine what had gone wrong. He inserted a dilation rod, which is plainly visible on the ultrasound, both as a probe and an orientation marker. *Id.* at p. 173. According to Dr. Egherman, it was medically imperative to ascertain the nature of Plaintiff's complication because something traumatic, such as a ruptured artery, could rapidly lead to death. It is this insertion of the dilation rod to which Plaintiff referred in her deposition when she testified that "he proceeded to go back in there again..." Doc. No. 71, Roe Depo., p. 116. This insertion of the dilation rod also appears to correspond to paragraphs 34 and 44 of Plaintiff's amended

complaint (Doc. No. 39) in which she alleges that Dr. Egherman forcibly continued the abortion despite her revocation of consent. On the strength of his diagnostic assay, Dr. Egherman concluded three things: (1) he had perforated Plaintiff's uterus; (2) she required emergency transport to the hospital via ambulance; and (3) she needed to be stabilized. Doc. No. 75, Egherman Depo., p. 175.

Dr. Egherman testified that, following his decision to call the ambulance[2], he ordered intravenous saline to maintain blood volume, prophylactic antibiotics to counter any incipient infection, the administration of oxygen through nitrous oxide mask, the packing of Plaintiff's vagina with sterile gauze, and uterine massage to tightened up her relaxed reproductive organs. *Id.* at pp. 176-178. Before Plaintiff arrived at the hospital, Dr. Egherman called the emergency room attending physician to apprise him of her status. *Id.* at p. 196. He also spoke to the on-call OBGYN specialist who removed the fetus and performed the surgery to repair Plaintiff's injuries. *Id.*

The Court notes a few non-material disagreements between Plaintiff's perception of the abortion and that of Dr. Egherman. Plaintiff testified that she received intravenous sedation in her left arm before the abortion began, and that these lines were removed when she sat up complaining of pain. Doc. No. 71, Roe Depo., p. 85. Dr. Egherman, on the other hand, who was testifying while reading medical records (Doc. No. 75, Egherman Depo., p. 143), stated that i.v. lines were administered for the first time as part of the effort to stabilize Plaintiff. Plaintiff and Dr. Egherman agree, however, that he had to help insert the i.v. during the daignostic and stabilization phase. Plaintiff also believes without any corroborating evidence that the use of the mask and i.v. lines

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[2] The actual call was placed by a clinic staff member. Doc. No. 75, Egherman Depo., p. 196.

during the stabilization phase were an effort to sedate her. Doc. No. 71, Roe Depo., pp. 86, 88, 113, 115.

Plaintiff required a week in the hospital and six weeks rest at home to recover from her emergency surgery. *Id.* At pp. 125-127. She apparently did not suffer sterility because she became pregnant again in 1999, though this pregnancy was also terminated with an abortion. *Id.* At p. 40.

Plaintiff originally filed her complaint in July of 1999. Doc. No. 1. This complaint was dismissed on the ground that Plaintiff failed to allege that Defendants were motivated by a desire to interfere with her access to reproductive healthcare services .[3] Doc. No. 29, pp. 11-12. After appeal, Plaintiff filed an amended complaint (Doc. No. 39) which is the basis for the instant order.

Standard of Review

Summary judgment is authorized "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P.56(c) *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate only in circumstances where "the evidence is such that a reasonable jury could [not] return a verdict for the nonmoving party." *Id.* The moving party bears the burden of proving that no genuine issue of material fact exists. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986)

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[3] The dismissal and subsequent appellate decision also addressed the question of whether Plaintiff ought to be entitled to proceed anonymously, but this issue is not relevant to the instant order.

In determining whether the moving party has satisfied the burden, the court considers all inferences drawn from the underlying facts in the light most favorable to the party opposing the motion and resolves all reasonable doubts against the moving party. *Anderson*, 477 U.S. at 255. The court may not weigh conflicting evidence or weigh the credibility of the parties. *See Hairston v. Gainesville Sun Pub. Co.* 9 F.3d 913, 919 (11th Cir. 1993) (citation omitted). If a reasonable fact finder could draw more than one inference from the facts, and that inference creates an issue of material fact, then a court must not grant summary judgment. *Id.* (citation omitted).

Analysis

1. The Appellate Decision

It is necessary at the outset to clarify the scope of *Roe, II c. Aware Woman Center for Choice, Inc.*, 253 F.3d 678 (11th Cir. 2001), which is the intervening appellate decision. In the instant case the appellate court held that FACE could be invoked in any situation in which force or the threat of force was used to deny a woman access to reproductive healthcare services. *Id.* at 682 ("if the defendants restrained Roe for the purpose of preventing her from obtaining any [reproductive healthcare services], then she has adequately pleaded a violation of FACE..."). In other words, even though Congress expressly enacted FACE to chill certain forms of anti-abortion activism, *id.* At 683 ("Congress enacted FACE to prohibit conduct that interferes with the ability of women to obtain abortions.") (citation omitted), the statute does not end at an abortion clinic's front door. It reaches into the operating room itself, providing a remedy to any woman who alleges that anyone, including even her own abortionist, used force or the threat of force to violate her right to choose her own reproductive healthcare services.

The essence of FACE is its motive requirement.[4] *Id.* A tortfeasor violates the statute only if he or she deliberately uses force or the threat thereof "because" someone has sought "reproductive health services." 18 U.S.C. §248 (a)(1). This motive requirement is demanding. Mere negligence is not enough. An absentminded pedestrian, for example, who bumped into a woman entering an abortion clinic would not have violated FACE. Nor does FACE prohibit purely incidental burdens on this right og access. A bus driver who refused for safety reasons to stop a bus on a busy interstate highway to let a woman exit because she announced she wanted an abortion would not have violated FACE. Even outright crimes that incidentally burden a woman's ability to obtain reproductive healthcare services do not fall within the ambit of FACE. A mugger who held up a woman on her way to a scheduled abortion would not have violated FACE. *Id.* At 683 ("FACE's motive requirement targets [intentional conduct] while ensuring that FACE does not federalize a slew of random crimes that might occur in the vicinity of an abortion clinic.") (citation omitted). Thus, only tortfeasors with the willful intent, *see, e.g., Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 275-276 (1993), to deprive a woman of reproductive healthcare services are liable under FACE.

Plaintiff underestimates the importance of the intent requirement. At times in her memoranda, she treads on unsteady ground, arguing for something more closely

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4 Strictly speaking, FACE has three elements: (1) that a defendant by force or the threat thereof; (2) intentionally injures, intimidates or interferes with, any person (or attempts to do so); (3) because that person has obtained or intends to obtain reproductive healthcare services. 253 F.3d at 680.

For the purposes of its analysis, the Court will assume that the first and second elements have been satisfied and concentrate solely on Dr. Egherman's motive.

resembling medical malpractice or perhaps battery (*see e.g.* Doc. No. 77, pp. 7-8), and she further urges the Court to hold various Defendants responsible for Dr. Egherman's conduct under the doctrine of vicarious liability. However, the eleventh Circuit's decision in *Roe, II v. Aware Woman* did nothing to weaken or otherwise amend FACE's robust motive requirement. The appellate court, in other words, did not transform the statute into an all-purpose federal substitute for ordinary state torts. If Plaintiff wanted to recover for medical malpractice, or any other tort, she should have included such penchant causes of action in her complaint.

2. Was there a forced abortion ?

In her various memoranda, and in contradistinction to her complaint, Plaintiff contends that Defendants committed two, not one, distinct FACE violations. *See id.* at 4; Doc. No. 84, p. 6; Doc. No. 102, pp. 1-2). The first of these is the allegation that Dr. Egherman tried to perform a forced abortion. Plaintiff claims, in other words, that he sought to abort her fetus after she revoked her consent, but before any medical emergency arose. *See* Doc. No. 84, pp. 3-9.

This allegation relies on what can only be described as willful mischaracterization of Dr. Egherman's deposition testimony. In her memoranda, Plaintiff tried to craft a narrative of what transpired during the abortion by citing various lines from Dr. Egherman's deposition. *See, e.g., id.* At pp. 5-6. Though the lines she cites generally fall one after another in his deposition, his testimony, as is common with deponents as they answer questions, jumped around between topics, darting forward and then back in time. Like an unscrupulous journalist, Plaintiff has essentially "edited" and decontextualized her testimonial "footage" in a way that makes it appear as though Dr. Egherman said he did things he did not in fact do.

For example, under the first subheading 'a' on page five

of her memorandum in support of her motion for partial summary judgment (Doc. No. 84), Plaintiff cites pages 153:20-25, 154:22-25, 160:24-161:1 of Dr. Egherman's deposition for the proposition that Plaintiff revoked her consent to the abortion, but that Dr. Egherman nevertheless carried on against her wishes. The first two citations refer to Dr. Egherman's initial insertion of the dilation rod and its removal so he could inject Plaintiff with more local anesthetic to relieve her reported discomfort. Nothing about either of these two citations remotely implies that Plaintiff revoked her consent to the abortion. Plaintiff's third citation (to pages 160:24-161:1) refers to a genuine revocation of consent that took place much later in the procedure after things had gone seriously wrong. It was at this crucial moment, during which Plaintiff was in excruciating pain, that Dr. Egherman was trying to ascertain what sort of complication had occurred. There is no relationship whatsoever between the first two of these citations and the third, and they do not collectively suggest the conclusion that Plaintiff urges the Court to draw; namely, that Dr. Egherman was trying to perform a forced abortion. Plaintiff's citations in the three other subheadings of her memorandum (Doc. No. 84, p. 5) are similarly disjointed, stripped of context, and used only to obfuscate and mislead.

Presented with nothing but the record before the Court, no reasonable jury could conclude: (1) that Plaintiff revoked her consent to the abortion while it was still medically safe for Dr. Egherman to discontinue; and, (2) that Dr. Egherman pressed ahead nevertheless and, despite Plaintiff's revocation of consent; ordered her restrained so he could perform a medically unnecessary abortion. Plaintiff's deliberate misuse of Dr. Egherman's testimony to portray him as someone trying to perform a forced abortion is not only factually incorrect, but also is the sort vexatious and baseless allegation that verges precipitously in sanctionable bad faith. To the extent that Plaintiff alleges that she was the victim of a forced abortion, summary judgment is granted to all

Defendants.

3. Did Dr. Egherman violate FACE during the diagnostic and stabilization phase of the procedure?

With the issue of the forced abortion resolved, Plaintiff's cause of action turns on the question of whether Dr. Egherman's actions following her revocation of consent constitute a violation of FACE. This is what Plaintiff calls the second FACE violation. Plaintiff contends that her right to revoke consent at any moment during an abortion is inviolable, regardless of any danger to her health. Doc. No. 84, p.1 ("...when a woman says 'NO' it means 'NO'."). Dr. Egherman, on the other hand, asserts that acting in a patients best interests sometimes requires a doctor to act against her wishes. He argues that Plaintiff's revocation of consent was unknowing, and therefore ineffective, because it was made under the influence of pain, fear, and sedation. Doc. No. 75, Egherman Depo. Pp. 190-192. He also testified that full cervical dilation is in effect a point of no return for a woman undergoing an abortion because she stands an intolerable risk of potentially fatal infection if the fetus is not removed. *Id.* At p. 160. Dr. Egherman in fact believes that it would have been unethical for him to have abandoned Plaintiff on the operating table just because she asked him to do so. *Id.* at pp. 191-192. While this controversy poses searching philosophical questions, it is not necessary for the Court to reconcile Plaintiff's interest in her own autonomy and bodily integrity with Dr. Egherman's ethical obligations toward her. The only issue before the Court is whether Dr. Egherman had an illegal motive under FACE when he chose to restrain Plaintiff, and then reenter her vagina with his hands and medical instruments during the diagnostic and stabilization phase of the procedure.

Plaintiff contends that Dr. Egherman's explanation of why he restrained and reentered her is tantamount to a "necessity defense," which, she argues, exists neither in statute

nor in case law. *See, e.g.* Doc. No. 84, pp. 6-9. But this explanation fundamentally misunderstands the nature of Dr. Egherman's testimony. His explanation only seems like a "necessity defense" because Plaintiff, erroneously, seems to regard FACE as the federal statutory analogue of torts such as battery or malpractice. Perhaps if FACE were nothing more than these ordinary torts, which do not have a stringent motive requirement, Dr. Egherman's explanation would indeed constitute a necessity defense of sorts.

FACE, however, is neither a battery nor a malpractice statute. It is a statutory tort with three distinct elements, the last of which requires the putative tortfeasor to have had a specific motive. In explaining that what he did to Plaintiff was medically necessary, Dr. Egherman is simply stating that he did not have the motive that is an essential element of a FACE violation. In other words, Dr. Egherman is not pleading an affirmative defense to a FACE violation. He is arguing on the contrary that there was no FACE violation in the first place.

Dr. Egherman has not wavered from his contention that he acted in Plaintiff's best medical interests, and that he had no desire to interfere with her right to choose reproductive healthcare services. Indeed, as an unapologetic abortionist, he testified to his conviction that a woman's so-called "right to choose" is sacrosanct. Doc. No. 75, Egherman Depo., pp. 185, 192 ("If a patient wants to leave and has decided against the procedure, we don't want to do anything to that patient."). Plaintiff glibly dismissed Dr. Egherman's representations about his own motives as self-serving. *See e.g.*, Doc. No. 77, p.3 ("To bolster [the assertion that Dr. Egherman did not have illegal motives] [Defendants] quote from Defendant Egherman's deposition wherein he denies having a judicially impure motive. Stop the presses!"). Yet there is nowhere else to begin because the burden of proof falls squarely on Plaintiff, not on Dr. Egherman. The salient question, therefore, asks what evidence has Plaintiff adduced that creates any material

doubt about Dr. Egherman's reasons for doing what he did.

There is none. Plaintiff did not depose anyone else present during the procedure, so the Court does not have access to their insights concerning Dr. Egherman's conduct. Plaintiff also did not depose anyone on staff at the hospital where she was treated. Nor did Plaintiff compile any expert medical evidence to refute Dr. Egherman's contention that everything he did was medically necessary. Plaintiff's only affirmative "evidence" consists of her own deposition testimony, which does nothing more than recite conclusory statements about the wrongness of Dr. Egherman's conduct and second-guess his motives.[5]

Lacking meaningful evidence of her own, Plaintiff attempts to resist summary judgment by identifying three speculative reasons why a reasonable jury could infer that Dr. Egherman acted other than in her best interests: (1) his financial interest in Plaintiff's abortion and the abortions of the women in the waiting room; (2) concern for malpractice liability; and (3) concerns about political embarrassment. *See e.g.*, Doc. No. 102, pp. 6-7. These three reasons, however, are inadequate as matters of fact and law to avoid summary judgment.

As matters of fact, none of these putative "reasons" amounts to anything more than unsubstantiated speculation by Plaintiff, and it is elementary that such speculation is insufficient to resist summary judgment. Apart from being

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5Plaintiff's own conclusions about the wrongness of Dr. Egherman's conduct reflect a belief that he did something analogous to rape, battery, or medical malpractice. *See e.g.*, Doc. No. 71, Roe Depo., p. 89 ("After I told him about this pain, don't touch me again, I'm saying that he should not have gone back in there."); p. 113 ("And I consider that rape, because after I told you not to touch me, I know the pain was just excruciating he went back into me again."); p. 120 ("But like I said, everybody is entitled to their mistake and everybody should pay for what they do."); p. 121 ("I just feel that I was raped."); p.140 ("Because after I told him not to go in and he went in the second time, yes, I think he was, yes, trying to go in and intentionally damage me..").

devoid of any evidentiary support, the inferences Plaintiff urges the Court to draw are tenuous at best, and apparently driven by little more than personal loathing of Defendants who are described by Plaintiff's counsel as being part of the "pro-abortion behemoth." Doc. No. 84, p.9.

With respect to the first inference, no reasonable jury could conclude on this record that Dr. Egherman was motivated primarily by his financial interest in the abortions he was to perform on March 29, 1997 because he had no interests. He testified that he wa too "rattled" by Plaintiff's complications to do anymore abortions that day, and he went to the hospital that afternoon check on her. Doc. No. 75, Egherman Depo. Pp. 216-217.

Next, on the basis of the record before the Court, no reasonable jury could conclude that Dr. Egherman's frantic efforts to diagnose and stabilize Plaintiff were motivated by a desire to minimize malpractice exposure. As noted earlier, Plaintiff gathered no evidence whatsoever, much less expert evidence, that might provide a basis for questioning Dr. Egherman's direct representations about his own motives. In the absense of competent evidence that tends to impeach him, Dr. Egherman's testimony about his own conclusions, motives, and actions have to be taken as authoritative.

Finally, no reasonable jury could interpret Dr. Egherman's attempt to stabilize Plaintiff following a suspected perforation as a calculated response to the specter of "political embarrassment." Plaintiff offered no explanation in support of this conclusion. Such conclusory statements of "political embarrassment" do not create a genuine dispute concerning an issue of material fact about Dr. Egherman's motives or contradict his unimpeached and direct testimony.

In addition, regardless of their insufficiency as matters of fact, these three inferences would in any case be insufficient

as matters of law to preclude summary judgment. AS discussed earlier, what distinguishes FACE from torts such as battery and medical malpractice is its stringent motive requirement. Contrary to Plaintiff's apparent belief, a FACE violation does not simply occur because someone like Dr. Egherman acts with motives that a reasonable jury may happen to dislike. In other words, even if it were true, which the undisputed evidence shows it was not, that Dr. Egherman tried to stabilize Plaintiff's severe injuries because he was concerned primarily about medical malpractice, it does not follow that he violated FACE.

18 U.S.C. §248(a)(1) protects women from persons who use force or the threat thereof for the express purpose of denying women access to legal reproductive healthcare services. It does not establish criminal or civil penalties for persons whose conduct, even if unequivocally illegal, merely places incidental burdens on access to reproductive healthcare. In other words, alleging that Dr. Egherman restrained Plaintiff for no other reason than to minimize his malpractice exposure, while reprehensible, is not the same thing as allegaing that he restrained Plaintiff for the express purpose of preventing her from obtaining the reproductive healthcare services of her choice. Once this distinction between purposeful and incidental burdens on a woman's right to choose her own reproductive healthcare services is understood, it is clear that Plaintiff cannot prevail. None of the three motives Plaintiff urges the Court to impute inferentially to Dr. Egherman are wrongful under FACE.

In summary, Plaintiff's cause of action against Dr. Egherman suffers from not simply a paucity of affirmative evidence, but a glaring lack thereof. Her allegation that Dr. Egherman tried to perform a forced abortion is premised on a willful misreading of his deposition testimony. Beyond this claim, her case rests on three dubious inferences, unsupported by any credible evidence, about what Dr. Egherman's motives were when he ordered her restrained during the diagnostic and

stabilization phase of the procedure. None of these three inferences are reasonable as matters of fact because they are contrary to the direct evidence of record and they depend on unsupported interpretations of Dr. Egherman's deposition testimony. Furthermore, none of these motives corresponds as a matter of law to the specific intent that FACE requires.

CONCLUSION

For the foregoing reasons, summary judgment is **GRANTED** TO Dr. Egherman (Doc. No. 89) on the ground that there is no evidence that he acted with a motive that is required under FACE. Summary judgment is also **GRANTED** to the three remaining Defendants (Doc. No. 66) on the ground that they cannot be vicariously liable for the wrongful conduct of their agent, Dr. Egherman, once he has been found to be without liability. Finally, summary judgment is **DENIED** to Plaintiff (Doc. No. 83).

Any outstanding motion not specifically addressed in this order is rendered moot.

The Clerk is directed to close this case.

DONE AND ORDERED at Orlando, Florida, this 10th day of June, 2003.

/S/ Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JANE ROE, II,
Plaintiff,

-vs- **Case No. 6:99-cv-8500Orl-19KRS**

AWARE WOMAN CENTER FOR CHOICE, INC., EDWARD W. WINDLE, JR., PATRICIA B. WINDLE, WILLIAM P. EGHERMAN, M.D.
Defendants.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the Plaintiff, **JANE ROE, II**, take nothing, that the action be dismissed on the merits, and that the Defendants, **AWARE WOMAN CENTER FOR CHOICE, INC., EDWARD W. WINDLE, JR., PATRICIA B. WINDLE, WILLIAM P. EGHERMAN, M.D.**, recover of the Plaintiff, **JANE ROE, II**, their costs of action.

Date: July 10, 2003

SHERYL L. LOESCH, CLERK

By: /S/ C. Houston
C. Houston, Deputy Clerk

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-14071
Non-Argument Calendar

D.C. Docket No. 99-00850-CV-ORL-19KRS

JANE ROE, II

Plaintiff-Appellant,

versus

AWARE WOMAN CENTER FOR CHOICE, INC.
A Florida corporation,
EDWARD W. WINDLE, JR.,
PATRICIA BAIRD WINDLE,
WILLIAM P. EGHERMAN, M.D.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(January 23, 2004)

Before BIRCH, DUBINA, and CARNES, Circuit Judges.

PER CURIAM:

The plaintiff, who is proceeding anonymously, under the name Jane Roe, II, suffered complications during the course of an abortion in March of 1997. Thereafter, she brought suit against the clinic, Aware Woman Center for Choice, Inc., the owners of the clinic, Patricia and Edward Windle, and the physician who attempted to perform the abortion, William Egherman. She did so pursuant to the Freedom of Access to Clinic Entrances Act, 18 U.S.C. §248. On this appeal, we consider the district court's grant of summary judgment in favor of the defendants. We affirm because the record is devoid of any evidence that the defendants had the statutorily-required motive necessary to violate FACE.

I. Procedural History

This is not the first time that this case has been before this Court. Previously, the district court dismissed Roe's complaint under Fed.R.Civ.P. 12(b)(6) and denied her request to proceed anonymously. Roe appealed. We remanded in order to allow Roe to amend her complaint to state a claim under FACE and to proceed anonymously. Roe, II v. Aware Woman Center for Choice, Inc., 253 F.3d 678 (11th Cir. 2001). As we will discuss in more detail shortly, we were explicit in our opinion about what Roe would be required to allege and prove in order to successfully bring a claim under FACE. Id. At 680-83.

The case is now back before us for review of the district court's order granting summary judgment to the defendants and denying all other pending motions as moot.

II. Facts

A.

In early March 1997, Roe visited the clinic and signed a form indicating, among other things, that she understood the various risks involved in obtaining an abortion and that she consented to receiving medically necessary treatment in the event of complications. On March 29, 1997, she again signed the same form when she returned to the clinic in order to undergo what would be her fourth abortion.[1]

Before the procedure began, Roe became nervous because she thought women were being called into surgery rather quickly and because of her unexplained fears of both pain and punishment. Once in the surgery room, Dr. Egherman gave Roe nitrous oxide gas to help relax her. A patient advocate, whose job was to attend to Roe's emotional concerns, was in the room.

Dr. Egherman began the surgery by inserting a speculum, sterilizing Roe"s cervix, applying a topical gel to reduce any pain associated with the lidocaine injections, and giving the lidocaine injections. He dilated Roe through the insertion of increasingly larger dilators and then began to use a canula which is connected to a vacuum aspirator and used to remove the fetus. Dr. Egherman recognized that the canula was struggling to remove tissue. He used his bear forceps in an attempt to remove the tissue, and at that point realized that something was wrong.

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[1]Roe II states that this was Roe's third abortion, however a more developed record now before us makes clear that it was actually her fourth abortion. (Roe Dep. At 54-55, 62, 121.)

Dr. Egherman began to diagnosis the problem, determine whether there might be internal bleeding, asses whether hospitalization was necessary, and stabilize Roe for transfer to the hospital. An ambulance was called on his order, and he spoke to the emergency physician and OB/GYN on duty at the hospital. Dr. Egherman did not perform anynore abortions that day because he was too shaken to do so. He went to the hospital to check on Roe, who had suffered a perforated uterus and a lacerated colon. Roe underwent surgery at the hospital to repair the damage and the remove the fetus.

B.

Throughout the entire procedure at the clinic, beginning with the insertion of the speculum, Roe complained of unusual discomfort and/or pain.

At some point, Roe ordered Dr. Egherman to stop and said that she wanted the clinic to call her mother and that she would drive herself to the hospital. The record is not clear as to when Roe ordered Dr. Egherman to stop. Roe's deposition suggests that Dr. Egherman began to perform the abortion and after he realized there was a problem continued some procedure on her. (Roe. Dep. At 120-23; 140-41.) However,, Roe's argement on appeal is that there was a time after she ordered him to stop and before he started treatment (diagnosis and stabilization) when he continued to attempt to perform the abortion.

Additionally, at some point Dr. Egherman ordered others in the room to hold Roe down. The record is unclear as to whether this was done while he was continuing to attempt to perform the abortion or when he was diagnosing the problem and stabilizing Roe for the ride to the hospital.

For reasons we will explain below, these factual

disputes are not material.

III. Summary Judgment Standard

The district court granted summary judgment for the defendants pursuant to Fed.R.Civ.P.56. "We review de novo a summary judgment ruling, applying the same legal standard used by the district court." Williamson Oil Co., Inc., v. Philip Morris USA, 346 F.3d 1287, 1298 (11th Cir. 2003). Pertinent here, the Supreme Court has explained that standard as follows:

Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery an upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no "genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. V. Catrett, 477 U.S. 317, 322-23, 106 S.Ct.

2548, 2552 (1986)
(emphasis added).

IV. Discussion

A.

In relevant part, FACE prohibits using force to injure, intimidate or interfere with a woman because she has obtained, or to prevent her from obtaining, reproductive health services.[2] 18 U.S.C.§ 248(a)(1). The focus of Roe's first appeal was whether she had alleged that the defendants actions were motivated by a desire to prevent her from obtaining reproductive health services. Roe, II, 253 F.3d at 681. The dispositive issue now is whether there exists a material issue of fact as to the defendants' motive.

We begin by revisiting Roe, II to understand FACE's motive requirement. Roe, II noted that FACE specifically defines "reproductive health services" in a broad manner which includes "medical, surgical, counseling, or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy."Id. at

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[2]FACE provides:

> (a) Prohibited activities - Whoever -
> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services; . . .
> Shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

18 u.s.c. §248 (a).

681 (quoting 18 U.S.C. §248 (e)(5)). With this definition in mind, we concluded that :

> For purposes of FACE, it matters not whether the reason Roe wanted to leave the clinic immediately and go to a hospital emergency room was so that she could have the damage done to her uterus repaired, or because she had changed her mind and wanted to save the pregnancy, or because she wanted to have the abortion completed at a hospital instead of at the clinic. If the defendants restrained Roe for the purpose of preventing her from obtaining any of those services, then she had adequately pleaded a violation of FACE because all of those services fall within the statutory definition of "reproductive health services."

Id. At 682 (emphasis added). From there, we went on to explain that:

> The next question then is whether Roe's complaint can be construed as alleging that defendants, in restraining Roe, were motivated by a desire to prevent her from obtaining those services. Defendants contend that it is unreasonable to assume that they restrained Roe in order to prevent her from obtaining reproductive health services. They argue that if they did restrain Roe, the only reason they did so was to protect her life and health and prevent further injury from the complications that had arisen during the course of the abortion procedure. Roe concedes that if that were the defendants' motive, there was no violation of FACE.

Id. (emphasis added; footnote omitted). In a footnote, "[w]e agree[d] with [Roe's] concession that if the defendants' sole motive was to protect Roe's life or health [then] the defendants'

win" and went on to anticipate that summary judgment would be filed on remand. Id. at n.5.

B.

Because the district court has now granted summary judgment for the defendants, we are called upon to determine whether there is a question of material fact as to the defendant's motive. Our review of the record indicates that there is not.

During discovery, only Roe, Egherman, and the Windles were deposed. The patient advocate, whose job was to focus on Roe's emotional needs and concerns was not deposed. Dr. Egherman's surgical assistant was not deposed. The various clinic personnel who entered the surgery room once Dr. Egherman determined there was a problem and began calling out for a sonogram machine and help were not deposed. And, of those who were deposed, the Windles were of no help to Roe in establishing motive because they were not even at the clinic when Dr. Egherman attempted to abort her fetus. That leaves only the depositions of Roe and Dr. Egherman to consider.

Turning first to Roe's deposition, it is clear that she can offer no admissible evidence, as distinguished from speculation, conjecture, and opinion, about what Dr. Egherman's motive was in ordering that she be restrained and continuing to treat her even after she had ordered him to stop. The following excerpts are typical of Roe's deposition:

> Q. Well, do you know whether he was holding you down or keeping you still or doing whatever he was doing for your own benefit to stabilize you?
> A. I don't think it was for my own benefit. It was because I raised my voice and told him that the pain that I was feeling was not pain that I had ever felt before and I said to let me go. And, because of that, they kept me there . . . .

Q. Do you think he was doing was for your own good?
A. No.
Q. Do you think he was doing it for your safety?
A. To go back in me again for my safety?
Q. To do everything he did?
A. No. No.
Q. Well, why do you think he did it?
A. To go in and finish the procedure . . .
. . .
Q. Let's assume hypothetically the doctor made a mistake. He did something wrong in this procedure and he needed to go back in and do what he did to make sure you wouldn't die. Okay?
A. Uh-huh.
Q. Do you think he should have gone back in and did what he did?
A. No.
Q. He should have let you die?
[objection]
A. No. He shouldn't have let me die, but he should have not gone back in. If he didn't go back in for what he was going in for, why would you go back in?
Q. What if he had to go back in just to save your life? He couldn't complete the abortion. He had done something terribly wrong. He needed to go back in for other reasons.
[objection]
A. I still don't think he should have went back in. What other reason would he have to go backin than to get the fetus?
Q. Assuming he had to go in to stabilize you — ? To stabilize you. Assuming he had to do that. For a perfectly valid medical reason, he had to go in. Okay?
A. Uh-huh.
Q. Just assume that. I want you to assume he had to back in.

A. Uh-huh.
Q. Do you agree with him going back in?
[objection]
[A.] No.
. . . .
Q. You still wouldn't have wanted him to go in?
A. No.

(Roe Dep. at 88-91.

Although Roe assumes that Dr. Egherman's sole motivation was to continue the abortion, when asked point blank she admitted that she did not know what his motivation was. (Roe Dep. at 120) ("Q. And you don't know why he went back in? A. No, I don't". Roe offered no evidence that Dr. Egherman's motivation was to prevent her from obtaining reproductive health services.

In contrast, during his deposition Dr. Egherman explained that a doctor cannot obey a woman's demand that the abortion be stopped at just any time, because she might risk death if he did so. There is, according to his unrebutted testimony, "a point of no return." (Egherman Dep. aat 160.) He also specifically testified that his interest was in protecting Roe's health and safety.

In response to a question from Roe's counsel about how Dr. Egherman determined that it was necessary to restrain a patient, he explained that a patient is restrained "if his or her actions to leave would jeopardize his or her health." Dr. Egherman was explicit that Roe's attempt to leave would have put her life oe her health in danger." He explained that Roe was "under the influence of nitrous oxide, fear, and pain" and thus was "not in her right mind to make a logical decision." He explained that "while she says she wanted to me to stop, and she wanted to get out of there, I could not let her leave

because that would have killed her. It was likely to have killed her. And my primary purpose is to protect and safeguard her health." He further noted that he has let "numerous [other] patients leave if they wanted to leave." He concluded that he "would be negligent if I let her heave without making sure that her, you know, her health was stabilized and safeguarded." (Egherman Dep. at 190-92.)

Counsel for the Windles and the clinic then questioned Dr. Egherman during the deposition. The physician confirmed that he acted out of medical necessity and suggested that he had "breached that point of no return" before Roe ordered him to stop. (Egherman Dep. at 194-95.) Dr. Egherman was asked: "At any point in time, were your actions done to prevent her from going to a hospital, or — or getting an ambulance, or seeking any other reproductive health care services?" (Egherman Dep. at 195) Dr. Egherman's response was: "Oh, I never, never prevented her from seeking any reproductive healthcare services, that was never the issue." (Egherman Dep. at 196.) Dr. Egherman wanted Roe to go to the hospital and had the ambulance called for her. He also spoke to the emergency room physician and the OB/GYN so they would be prepared "to take care of my patient" (Egherman Dep. at 196.) Dr. Egherman confirmed that the "only reason" that he ordered that Roe be restrained was to protect her health and safety. (Egherman Dep. at 197.)

In light of this record, there was no material issue of fact as to whether Dr. Egherman was motivated by a desire to prevent Roe from obtaining reproductive health services, as required by FACE and explained in Roe II, see supra. Roe previously conceded, and we agreed, that if his motivation was to protect her life and safety, then she could not successfully prove a violation of FACE. Roe II, 253 F.3d at 682 &n.5. Because there is no genuine issue of material fact disputing Dr. Egherman's position that his motivation was to protect Roe's

health and safety, the district court's grant of summary judgment in the defendant's favor was appropriate.

C

One last argument merits discussion. Roe contends that the defendants attempted to perform a forced abortion on her and given that fact, as a matter of law, the only possible motivation that the defendants could have had was to violate FACE. She cites no authority for this argument, but explains that because the effect of the defendants actions would have been to end her pregnancy, she would be unable to obtain reproductive health services elsewhere. Roe's theory is unsound because it confuses motive with effect. While continuing an abortion after a patient wishes it to stop does have the effect of preventing that patient from obtaining reproductive health services elsewhere, that is merely a side-effect when the abortionist is motivated by a desire to protect the health and safety of the mother because the procedure has progressed too far to stop or complications have arisen that require continuing it. FACE is only violated when the motivation requirement is met. Roe II, 253 F.3d at 680-81. Here it was not.

V. Conclusion

We AFFIRM the district court's grant of summary judgment to the defendants and, after careful review, we conclude that Roe's other issues on appeal are meritless.[3]

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[3] Roe's other arguments and issues do not warrant discussion.